be heard by the Sessions Court unless of course the Public Prosecutor should choose to invoke section 41A of the Act which empowers the Public Prosecutor to require any case in respect of an offence under the Act to be tried by the High Court. It is of fundamental importance therefore that a distinction be drawn between the present case and *Hun Peng Khai's* case. In *Public Prosecutor* v. *Hun Peng Khai & Ors.*, *supra*, the case was transmitted to the High Court for trial by the Sessions Court President who felt bound by the judgment of Shaik Daud J. in Kuantan Criminal Trials Nos. 1 and 4 of 1984. This was done after the trial had commenced in that Court, *i.e.* after they had each claimed trial and one witness Sergeant Major Mokhtar had already given evidence. In that sense the accused had a vested right to have his case heard in the Sessions Court. In the instant case, however, the trial had not yet commenced and as such it cannot be said that the accused had a vested right to trial in the Sessions Court. We are of the view that so long as the case was still before a subordinate court and the trial had not yet commenced the Public Prosecutor by virtue of the power vested in him under section 41A of the Act and also under Art. 145(3) of the Federal Constitution may choose the forum for trial.

Fundamentally section 41A of the Act creates the further distinction between the present case and *Hun Peng Khai's* case. The case under consideration was transferred from the Sessions Court to the High Court for trial pursuant to a requisition by the Public Prosecutor under section 41A of the Act whereas it was not so in *Hun Peng Khai's* case. For convenience, section 41A(1) is reproduced hereunder and it reads –

"41A. (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is *required by the Public Prosecutor to be tried by the High Court*, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable." (the emphasis is ours).

For reasons we have stated, we allow this appeal. The order of the Judge is set aside and the case is remitted to the High Court for trial.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

CHIN KOK KWONG CONSTRUCTION SDN. BHD. v. SUNRISE TOWERS SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) November 18, 1983 & May 18, 1984]

[Penang – Civil Suit No. 187 of 1982]

Company Law – Winding Up Order – Whether plaintiffs' solicitor can recover debts after appointment of Official Receiver.

Practice and Procedure – Leave to amend Indorsement and Statement of Claim – Principles applicable – R.H.C. 1980, O. 20 r. 5(5).

A Winding Up Order was made against the plaintiff company on November 7, 1977. However, on March 2, 1981, the order was stayed until further order. It was also ordered, *inter alia*, that the Official Receiver or his solicitors do forthwith demand and/or recover by all lawful means all moneys due from all debtors of the company for distribution to the various creditors of the company.

By a Writ of Summons dated April 7, 1982, the plaintiffs claimed against the defendants the sum of $39,300 being deposit paid under a Sale and Purchase Agreement dated October 2, 1975 entered into between the plaintiffs as purchasers and the defendants as vendors, for the purchase of an apartment. The plaintiffs sought to amend the Indorsement of their claim and Statement of Claim by adding a new cause of action against the defendants, namely, the recovery of a sum of $29,936.71 being money allegedly due and payable by the defendants to the plaintiffs under a building contract dated March 16, 1977 for work done by the plaintiffs as contractor and the defendants as employer.

The issues that arose were whether the plaintiffs' solicitor had authority to institute the suit herein and that even if this suit had been properly instituted, whether, on the facts, the plaintiffs could apply for leave to amend under Order 20 rule 5(5), Rules of the High Court, 1980.

Held: (1) a letter by the Official Receiver stating that he had no objection to the plaintiffs' solicitor taking court action against the debtors owing money to the plaintiff company before the Winding Up Order dated November 7, 1977 adding, that in such event, they would be acting, not on behalf of the Official Receiver, but on behalf of the plaintiffs who would be liable as regards all costs and expenses, can in no way abrogate or even modify the order dated March 2, 1981 enabling only the Official Receiver or his solicitors to recover all moneys due from all debtors of the company;

(2) in the circumstances it could not be said that the new cause of action arose out of the same facts or substantially the same facts as the cause of action for the return of the deposit for the purchase of the apartment. To allow such an amendment would turn a suit of one character into a suit of another and inconsistent character;

(3) this suit was instituted without authority and should accordingly be dismissed with costs.

[*Editorial Note* : The plaintiffs' appeal to the Federal Court in F.C.C.A. No. 203 of 1984 has been withdrawn.]

Cases referred to:

(1) *Simmons* v. *Liberal Opinion Ltd.* [1911] 1 K.B. 966.
(2) *Looi Guan Kway* v. *Low Lean Bok & 4 Ors.* [1938] M.L.J. 35.
(3) *Grant Advertising International Inc. & Anor.* v. *Glaze* [1968] 1 M.L.J. 31.
(4) *Re L.Y. Swee & Co. Ltd.* [1968] 2 M.L.J. 104, 107.

CIVIL SUIT.

Dulip Singh for the applicant.
Lee Kok Liang for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J. : By a Writ of Summons issued on April 7, 1982 the plaintiffs herein are praying for the return of a sum of $39,300 from the defendants being deposit paid under a Sale and Purchase Agreement dated October 2, 1975, entered into between for the purchase of an apartment.

The plaintiffs now wish to amend the Indorsement of their claim and Statement of Claim by adding a new cause of action against the defendants. Specifically, they wish to add a new prayer for the recovery of a sum of $29,936.71 being money allegedly due and payable by the defendants to the plaintiffs under a building contract dated March 16, 1977 for work done by the plaintiffs as contractor for the defendants, as employer, inclusive of attendances and profits due to the plaintiffs, certified by the defendants' architects as due and payable by their letter dated June 6, 1977.

It is not disputed that a Winding Up Order was made against the plaintiff company by Arulanandom J. on November 7, 1977. However, on March 2, 1981, it was ordered by Arulanandom J., by consent, that that Order be stayed until further Order. It was further ordered that the plaintiff company be at liberty to carry on business upon terms and resolutions approved by the Creditors' Meeting held on June 28, 1980. It was also ordered, *inter alia*, that the Official Receiver or his solicitors do forthwith demand and/or recover by all lawful means all moneys due from all debtors of the company and upon recovery of same and after deduction of costs, the balance be deposited with the Official Receiver or his solicitors for distribution to the various creditors of the plaintiffs.

Mr. Dulip Singh, for the plaintiffs, upon being queried as to his authority to institute the suit herein, said that he acted on the authority of the Official Assignee in writing. A perusal of that writing, however, shows that the Official Receiver by a letter dated October 25, 1981 (Encl: 20 in Companies Winding Up No. 5/77 Pt. III/30) merely said that he had no objection to Messrs. Dulip Singh & Co. taking Court action against the debtors owing money to the Company before the Winding Up Order dated November 7, 1977 adding, that in such event, they would be acting, not on behalf of the Official Receiver, but on behalf of the plaintiffs who would be liable as regards all costs and expenses. In any event, this letter can in no way abrogate or even modify the Order of Arulanandom J. dated March 2, 1981 enabling only the Official Receiver or his solicitors to recover all moneys due from all debtors of the company. A solicitor's authority to act may be questioned at any stage of the proceedings and even at the conclusion of the trial: see *Simmons* v. *Liberal Opinion Ltd.*(1) In these circumstances, I am quite satisfied that this suit was instituted without authority and it is accordingly dismissed with costs. The application for leave to amend is, in consequence, struck out.

I might add that even if this suit had been properly instituted I would not have been disposed to granting leave to amend because, although Order 20 rule 5(5) of the Rules of the High Court, 1980 provides that an amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add a new cause of action, this is subject to the all-important proviso that the new cause of action arises out of the same facts, or substantially the same facts, as the cause of action in respect of which relief had already been claimed in the action by the party applying for leave to make the amendment.

I am satisfied that in this case the claim for return of the deposit arises under a Sale and Purchase Agreement dated October 2, 1975 which the parties had agreed to rescind on November 7, 1977 whereas the claim for works carried out arises from an agreement in writing dated March 16, 1977 entered into by the plaintiffs as contractor and the defendants as employer. I fail to see how in the circumstances it could be said that the new cause of action arises out of the same facts or substantially the same facts as the cause of action for the return of the deposit for the purchase of the apartment in respect of which relief had already been claimed in the Writ and Statement of Claim. To allow such an amendment would turn a suit of one character into a suit of another and inconsistent

character. Manifestly, this is not permissible. It is not difficult to cite an anthology of cases for this proposition but I need only refer to *Looi Guan Kway* v. *Low Lean Bok & Ors.*[2] applied in *Grant Advertising International Inc. & Anor.* v. *Glaze.*[3]

It remains for me to consider the question of costs. Where a suit is instituted by solicitors on behalf of a company without authority there is authority for saying that its directors must bear the costs personally – *Re L. Y. Swee & Co. Ltd.*[4] – and I so order.

Order accordingly.

Solicitors: *Dulip Singh & Co.; Lee Kok Liang & Co.*

HO SHEE JAN v. STEPHENS PROPERTIES SDN. BHD.

[O.C.J. (Chan J.) November 10, 1984]

[Kuala Lumpur – Originating Summons No. C108 of 1981]

Company Law – Shares – Transfer of – Refusal to register – Veto of transfer must be exercised within a reasonable time – Companies Act (Cap. 185), ss. 105 & 162.

Company Law – Shares – Transfer of – Refusal to register – Whether transfer properly lodged – Estoppel by conduct – Companies Act (Cap. 185), ss. 105 & 162.

Contract – Commercial contracts – Doctrine of fair play in commercial conduct.

The applicant was the transferee of 279,300 shares in Stephens Properties Sdn. Bhd. By A21 of the Articles of Association of the company, the transfer form which should have been left at the company's registered office was instead left with the company secretary. However, the company acknowledged receiving the transfer in a letter of December 24, 1980 and advised that his application for the transfer of the shares had been tabled before the board on December 1, 1980, Art. 23 of the Articles of Association of the company expressly lays down that if the directors refuse to register a transfer they shall have to serve notice of the refusal to the transferee within one month after the date on which the transfer was lodged. In this case between December 24, 1980 and May 22, 1981 nothing was done, a delay of over five months. On May 22, 1981 the applicant was informed that the board of directors had decided against the registration of the transfer.

The applicant contended that the company's power of veto against the transfer of the shares had been lost by undue delay.

In defence the company raised for the first time in these proceedings objections that the transfer was not properly lodged at the registered office of the company.

Held: (1) the proper time for the exercise of the power of the veto is the occasion at which the transfer is placed before the board for confirmation or within a reasonable time from that date. In the present case the board had by unnecessary delay lost its chance of exercising its power of veto against the transfer of the shares to the applicant.

(2) as regards the company's contention that the transfer had not been properly lodged the company cannot blow hot and cold as it suits it. Applying the principle of estoppel by conduct to the present case it would be unfair or unjust to allow the company to say that the transfer was not lodged at the registered office when the board had let the applicant believe that the lodgement was valid by considering the question of the transfer at the company's board meeting.

Cases referred to:

(1) *In re Copal Varnish Co. Ltd.* [1917] 2 Ch. 349, 353.
(2) *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 432, 436; [1968] 1 W.L.R. 1710.
(3) *In re Bede Steam Shipping Co.* [1917] 1 Ch. 123, 132.
(4) *In re Hackney Pavilion Ltd.* [1924] 1 Ch. 276, 279-280.
(5) *Moodie* v. *Shepherd (Bookbinders) Ltd.* [1949] 2 All E.R. 1044.
(6) *Panchaud Freres S.A.* v. *Et. General Grain Co.* [1970] 1 Lloyd's Rep. 53, 56-57.
(7) *Toepfer* v. *Cremer* [1975] 2 Lloyd's Rep. 118, 123.
(8) *Cerealmangimi* v. *Toepfer* [1981] 1 Lloyd's Rep. 337.
(9) *Bremer* v. *Mackprang* [1979] 1 Lloyd's Rep. 221, 340-341.

ORIGINATING SUMMONS.

R. Lazar for the plaintiff.
K. S. Narayanam for the defendant company.

Cur. Adv. Vult.

Chan J.: The woes of Mr. Ho Shee Jan began when he, as the transferee of 279,300 shares in Stephens Properties Sdn. Bhd., tried to have the shares registered in his name.

It is not very clear who the transferor of those shares is as his name has been left out in all the affidavits. Mr. Ho Shee Jan, in one of his affidavits, has mentioned that

"the shares in question belonged to a company controlled by one K.K. Sharma, which company had pledged their shares as security to Lloyds Bank International, Singapore and which bank in exercise of their rights of hypothecation had disposed [of] the said shares."